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Dee May  
Director  
Federal Regulatory Affairs

EX PARTE OR LATE FILED



March 24, 1999

**Ex Parte**

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

RECEIVED

MAR 24 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Re: CC Docket 98-1: In the Matter of The Petition of the State of Minnesota, Acting by and Through the Minnesota Department of Transportation and the Minnesota Department of Administration, for a Declaratory Ruling Regarding the Effect of Sections 253 (a), (b) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Right-of-Way**

Yesterday a conference call took place regarding the above proceeding Yil Guner, Chief Engineer of Empire City Subway, Claudia Pabo and David Kirschner, CCB Policy Division and me were participants on the call. The purpose of the call was to address questions raised by the Federal Communications Commission regarding how Empire City Subway operated in the boroughs of Manhattan and Bronx in New York City when processing requests from telecommunications carriers for the laying of cable in the City's conduit system. An overview of the franchise provided to Empire City Subway by New York City and its terms was also discussed.

Subsequent to the call, the attached material was provided to Ms. Pabo and Mr. Kirschner. Please feel free to call me with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Dee May".

Attachment

CC: C. Pabo  
D. Kirschner

No. of Copies rec'd 071  
List A B C D E

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

RECEIVED

MAR 24 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Petition of New York Telephone )  
Company for Approval of its Statement of Generally )  
Available Terms and Conditions Pursuant to Section )  
252 of the Telecommunications Act of 1996 and Draft )  
Filing of Petition for InterLATA Entry Pursuant to )  
Section 271 of the Telecommunications Act of 1996 )  
to Provide In-Region, InterLATA Services in the )  
State of New York )

Case 97-C-0271

**AFFIDAVIT OF YILDIRIM S. GUNER ON BEHALF OF  
BELL ATLANTIC-NEW YORK**

STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF NEW YORK )

Yildirim S. Guner, being duly sworn upon oath, deposes and states as follows:

1. My name is Yildirim S. Guner. My business address is 140 West Street, New York, New York 10007. I am the Chief Engineer of Empire City Subway Company, Limited ("Empire"), a wholly-owned subsidiary of New York Telephone Company (d/b/a Bell Atlantic-New York).
2. I have over nine years experience in the design, design supervision, maintenance and construction of telephone outside plant. My current responsibilities include all engineering functions at Empire. I hold a BSCE from Newark College of Engineering and an Executive Master of Science from Columbia University.
3. Empire owns approximately 10,183 miles of underground ducts located in the City of New York in the Boroughs of Manhattan and the Bronx. Empire does not own any poles or private rights-of-way. The purpose of this affidavit is to supplement the Affidavit of John L. White and to describe, from an operational perspective, how Empire provides access to its conduit system.

### **Background**

4. Empire was incorporated in 1891 following legislation which directed that all electrical and communication wires be placed underground in the City of New York. By authority of the New York State Legislature (Laws of 1891, Chapter 231), the City of New York Board of Electrical Control entered into an agreement with Empire on May 15, 1891 ("Franchise Agreement"), which granted Empire the non-exclusive right to construct, operate and maintain a system of underground subways (i.e., conduits and ducts) for low-tension telephone and telegraph electrical wires throughout the Boroughs of Manhattan and the Bronx. The Boroughs of Brooklyn, Queens and Staten Island were not then part of the City of New York. A copy of Empire's Franchise Agreement is attached hereto as Exhibit 1.

5. Empire is not in the business of affording communications for hire; nor is it a telephone common carrier. Empire does not own, operate or otherwise control any communications facilities.<sup>1</sup> Empire's core business is to lease space in its conduit system to any person or legal entity having "lawful power" to operate communications lines in New York City. Empire refers to its customers as its "tenants."

### **Current Users of the System**

6. At present, Empire has 36 tenants occupying its system. The predominant user of the system is Bell Atlantic-New York, which occupies approximately 67% of the ducts. Other users

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<sup>1</sup> Jurisdiction over Empire's rates and practices lies solely with the City of New York as the franchising authority. The New York Public Service Commission has properly determined that it has no jurisdiction over Empire. See, e.g., NYSCTA v. P.S.C., 87 A.D.2d 288, 292 (3rd Dep't 1982); Matter of City of New York v. Pendergast, 202 App. Div. 308, 316 (1st Dep't 1922).

occupy approximately 13% of the ducts. Approximately 20% of the ducts are currently spare and available for use on a first-come, first serve basis.

### **Rates**

7. Paragraph V of Empire's Franchise Agreement provides that Empire:

[M]ay fix a fair scale of rents to be charged ... which shall be at the same rate to all the occupants having a like use of said subways, conduits and ducts but the scale of rentals or any charges fixed or made by [Empire] shall at all times be subject to the control, modification and revision of [the City] or their successors; and no contract shall be made between [Empire] and any other company or corporation on any terms which shall not require payment by such other company or corporation of the rents at the rate so fixed, or as modified by [the City].

8. Empire's rates are determined by rate case proceedings held before the City of New York Department of General Services. Rate changes are made after public notice and all interested parties are afforded an opportunity to be heard. Empire last changed its rates in 1986. A copy of Empire's current rates for conduit rental is attached hereto as Exhibit 2. Tenants are billed monthly based on the amount of the system they occupy and/or for which they have bond commitments.<sup>2</sup>

### **Rules and Regulations**

9. Access to Empire's conduit system is governed by Empire's Rules and Regulations Governing the Occupancy of the Telegraph and Telephone Subways, as approved by the City of New York ("Rules and Regulations"). Empire's Rules and Regulations apply uniformly to all tenants, including Bell Atlantic-New York. Indeed, Empire treats Bell Atlantic-New York as an

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<sup>2</sup> When Empire constructs new conduits for a tenant, the tenant must guarantee the rental of the conduits for a minimum of ten years. Empire refers to these as "bond" commitments even though Empire does not require its tenants to actually supply a financial undertaking from a bonding agent.

external customer with regard to rental of Empire ducts. Empire's Rules and Regulations set forth the general requirements for occupying Empire's conduit system, including applications for space, minimum rental periods and payment terms, safety regulations, responsibility for installation, repair and maintenance of cables, etc. A copy of Empire's Rules and Regulations are attached hereto as Exhibit 3.

### **Conduit Rental Procedures**

10. Conduit rental from Empire is a simple four-step process: (1) the tenant locates an available duct in the system that meets its needs; (2) the tenant rods the duct to clear any obstructions and installs a tagged pull rope which serves to reserve the duct for that tenant's use; (3) the tenant submits an application for duct rental, indicating the sections occupied and other pertinent information; and (4) Empire updates its duct utilization and billing records based on the information provided in the application and commences billing. Tenants may perform all or any portion of the work associated with Steps 1-3 for themselves, or they may hire contractors or pay Empire to do this work. Each of these steps is described more fully below.

11. Step One: Duct Selection. Empire does not select which ducts its tenants may use, unless asked to do so by the tenant. Nor does Empire "reserve" ducts for any tenant's future use. Tenants are free to occupy any spare duct in the system. Which duct a tenant selects may be influenced by several considerations, such as the number of spares available in the section, the composition of the conduit (e.g., steel, plastic, fiberglass, tile, wood), and the type of run (i.e., express versus local). Typically, a tenant will make a preliminary determination of duct availability based on a review of Empire's records. Empire makes available its table maps (large maps showing which streets and where Empire's duct banks are located) and duct utilization

cards (detailed records by conduit section, showing which ducts may be spare) free of charge to its tenants to review at Empire's Customer Service Center.<sup>3</sup> Empire also provides copies of duct utilization cards (up to 10) free of charges. Tenants may purchase copies of maps and large batches of duct utilization cards (more than 10) for their permanent use. The charge for this service is based on Empire's standard hourly labor rate to cover the costs of reproduction.

12. In addition, tenants frequently perform field surveys to verify the availability of particular ducts. Often, tenants do field surveys in conjunction with other work, such as rodding and roping.

13. Step Two: Rodding and Roping. Each tenant is responsible for preparing ducts for its cable placements. This includes "rodding" the duct to clear any obstructions, placing inner ducts, if desired, and installing a rope or drag line for pulling the cable through the duct. Once a tagged rope is placed inside a duct, it is deemed "occupied" by the tenant. The Tenant cannot be displaced until it "surrenders" the duct by sending written notification to Empire that it has vacated the duct. Tenants may perform rodding and roping for themselves, hire contractors to do it or pay Empire's staff to do this work.

14. Step Three: File Application. Immediately after a tenant occupies a duct with a tagged rope, the tenant must send a rental application to Empire showing the location of the conduit section, the tagged duct location and other pertinent information. A copy of Empire's rental application form is provided as Exhibit 4, attached hereto.

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<sup>3</sup> Empire's records are set up so that other tenants' proprietary information can be masked or redacted when reviewed by another tenant.

15. Step Four: Record Update & Billing. Upon receipt of an application, Empire updates its duct utilization system and billing records. Billing commences as of the date the duct is first occupied by the tenant with a tagged rope and continues until the duct is vacated. Billing continues until the tenant submits an Application for the Surrender of Ducts. A copy of Empire's duct surrender application is attached as Exhibit 5.

#### **Cables and Subsidiary Connections**

16. Empire supplies the hardware (i.e., racks) on which cables (including slack, stubs, splice cases and other appurtenances ("facilities")) are placed inside the manhole. There is no charge for the provision of racks. Each tenant is responsible for placing, repairing, arranging, rearranging and removing its own facilities. Empire does not require tenants to rearrange their facilities unless they are improperly placed, create undue congestion or constitute a safety hazard.

17. Tenants generally perform cable work for themselves or hire contractors to do their cable work. Tenants may also hire Empire to place or remove cables, provided that Empire has the work forces available to do so. Empire does not perform cable maintenance for any tenant. Each tenant is strictly responsible for any damage to other tenant's facilities, the manhole structure or ducts caused by the tenant's employees, agents or contractors while performing work in Empire's conduit system.

18. Tenants are also responsible for construction of subsidiary connections. Subsidiary connections are the underground ducts which connect a manhole to a location other than another manhole, i.e., generally to a building or other premises to which telecommunications service is to be provided. Again, tenants may perform this work for themselves, or they may hire

contractors to do it. If Empire's workload permits, it will install subsidiary connections for a tenant on a time and materials basis.

19. In order to protect the integrity of its subway system and the facilities of its tenants, Empire has adopted a Manhole Point of Entry (P.O.E.) Procedures which govern how the walls of manholes shall be broken and restored during the installation of subsidiary connections. Prior to installing a subsidiary connection, Empire and the tenant (or its contractor) must conduct a joint field survey to ensure that the manhole can accommodate the subsidiary and to agree upon the exact location of penetration into the manhole wall. Empire also reserves the right to inspect the penetration during the work process and after its completion. The costs associated with the initial field survey and inspections are borne by the tenant installing the subsidiary. Costs of processing manhole penetration forms, field surveys and inspections are based on Empire's hourly labor rates for the personnel involved.

#### **Demand**

20. In the last 12 months, Empire's tenants have applied for total of 4,117 additional conduit sections from Empire. Of these, 3,740 sections were met from Empire's existing inventory of ducts.<sup>4</sup> Thus, over 90 percent of the time Empire has been able to meet new demand by utilizing existing spare capacity in its system, and access to the system was provided immediately upon demand. The remaining 377 sections required new construction.

21. Empire's Franchise Agreement requires it to construct additional conduit space to meet the needs of its tenants. When new construction is required, Empire provides written

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<sup>4</sup> This number reflects demand met by use of existing spare ducts, use of an indirect route or by removal of dead cable. Empire does not maintain records of whether a tenant's cable is in service. Whenever a tenant notifies Empire that an abandoned cable exists, Empire requests the owner of the cable to remove it to free-up the duct for use.



notification of the proposed construction to all tenants so that they can determine whether they have any future requirements which should be incorporated into the project. After 60 days, Empire determines the total requirements for construction, obtains all necessary permits from the appropriate City agencies and schedules the job. Empire's Methods and Procedures for processing requests for new construction attached as Exhibit 6.

22. Job scheduling is done on a first-come, first serve basis, unless the tenant's requested completion date would allow for later scheduling. Of course, actual construction time depends on a host of factors, including but not limited to, any City work restrictions and permit stipulations, work force availability, location (main thoroughfare versus side street), time of year and the amount of underground congestion encountered during excavation operations. Most construction jobs are completed in less than 140 days.

23. In the 18 month period from January 1, 1996 through June 30, 1997, Empire completed 145 new construction jobs for its tenants. The average time from date of request to completion during this period was 111 days. Empire has developed a Service Performance Measurement report to track the average duration of jobs requested by Bell Atlantic-New York as compared to the average duration of jobs requested by other tenants. The report shows that during the 18 month period ending June 30, 1997, the average construction time for Bell Atlantic-New York requested jobs was 117 days as compared to 105 days for other tenants. A copy of Empire's Service Performance Measurement report is attached as Exhibit 7. Hereafter, Empire shall publish this report annually.

24. In the last six months Empire has seen an unusual increase in demand. In 1996, Empire constructed approximately 61,100 trench feet of new conduits. In the first nine months of 1997,

Empire completed approximately 65,000 trench feet and expects to complete a total of approximately 130,000 trench feet by the end of the year. As a result, Empire has initiated a program to develop a forecast of demand and is taking reasonable and prudent measures to accommodate the additional requirements of its system.

25. Because of the relatively small number of tenants in Empire's system, Empire is able to forecast demand by canvassing each of its tenants individually regarding their future network construction plans to determine Empire's overall construction requirements. Based on these discussions, Empire estimates that its tenants will require new construction of approximately 150,200 trench feet in 1998.

26. Empire has embarked on an aggressive program to meet this recent increase in demand. In the last three months, Empire has increased its construction force by 12 percent and expects to add an additional 8 percent by year end. Empire has also added four construction vehicles and four new backhoes and 1 new rodding machine. Empire is also currently negotiating for the purchase or lease of a new, larger garage facility to accommodate its expanded work force, truck and equipment fleet and supply storage needs.

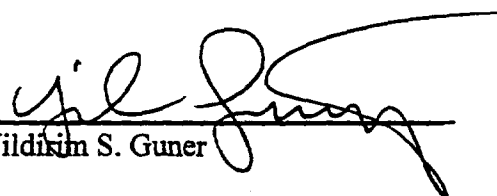
27. Furthermore, Empire will be able to absorb temporary spikes in demand should they occur. Historically, only about one third of Empire's work force time was spent on new construction. The remaining two-thirds was spent building subsidiary connections, rodding and roping ducts and other ancillary work. If needed, Empire has a significant pool of workers upon which it can draw to accommodate any unforeseen increases in demand.

28. By charter and by practice, Empire has provided access to its conduit system on a non-discriminatory basis for over 100 years, and will continue to do so as telecommunications competition continues to increase in New York.

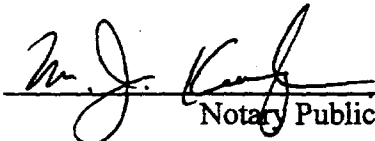
CONCLUSION

19. This concludes my affidavit.

I hereby swear, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge and belief.

  
Yildirim S. Guner

Sworn to before me  
this 30<sup>th</sup> day of October, 1997.

  
Notary Public

MICHAEL J. KEOGH  
Notary Public, State of New York  
NO. 41-4846995  
Qualified in Queens County  
Commission Expires Nov 30, 1998

IN THE MATTER OF THE SUPPLEMENTAL PETITION OF  
BELL ATLANTIC-NEW YORK FOR AUTHORITY TO  
PROVIDE IN-REGION INTERLATA SERVICES IN NEW YORK.

**Empire Franchise Agreement**

**AGREEMENT OF MAY 15, 1891**

**between**

**BOARD OF ELECTRICAL CONTROL, IN AND FOR  
THE CITY OF NEW YORK**

**and**

**EMPIRE CITY SUBWAY COMPANY (LIMITED).**

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THIS AGREEMENT, made this 15th day of May, 1891, by and between HUGH J. GRANT, Mayor of the City of New York, JACOB HESS and THEODORE MOSS as and constituting the Board of Electrical Control, in and for the City and County of New York, created under and by virtue of an Act of the Legislature of the State of New York, being Chapter 716 of the Laws of 1887, passed June 25, 1887, and the Acts of which said Act is amendatory, parties of the first part and the EMPIRE CITY SUBWAY COMPANY (LIMITED), a corporation duly organized and existing under and by virtue of the Laws of the State of New York, party of the second part.

WHEREAS, the said parties of the first part are authorized by said acts, as aforesaid, to cause to be devised a plan for placing underground of all electrical conductors in the City of New York and to carry the same into operation and effect:

AND, WHEREAS, by an instrument dated the seventh day of April, 1887, Jacob Hess, Theodore Moss and Daniel L. Gibbens, as Commissioners of Electrical Subways under and by virtue of an Act of the Legislature of the State of New York, being Chapter 499 of the Laws of 1885, passed June 13, 1885, as amended by Chapter 503 of the Laws of 1886, passed May 29, 1886, entered into a contract with the Consolidated Telegraph and Electrical Subway Company for the building of subways for electrical conductors in the City of New York, which contract was amendatory of a prior contract between said Company and said Commissioners dated July 22, 1886, and both of which contracts were subsequently ratified by an Act of the Legislature of the State of New York, entitled "An Act in relation to Electrical Conductors in the City of New York", passed June 25, 1887, and certain subways have been built by the said Consolidated Telegraph and Electrical Subway Company under said contracts;

AND, WHEREAS, the said Consolidated Telegraph and Electrical Subway Company, by a certain instrument bearing date the eighth day of December, 1890, conveys to the Empire City Subway Company (Limited) with the consent and authority of the parties of first part, and the approval of the Mayor and Counsel to the Corporation of the

City of New York, all the subways, conduits and ducts for telephone and telegraph conductors which it has constructed in said City, and also the subways, conduits and ducts for electric light and power conductors constructed by it for the use of the Edison Electric Illuminating Company of New York, and the said Consolidated Telegraph and Electrical Subway Company has applied to the parties of the first part for such a modification of its said contract as shall relieve it from the obligations to maintain manage and operate the subways, conduits and ducts so conveyed, and from any further obligations to build subways, conduits and ducts for telegraph or telephone conductors, or for the low tension conductors of the Edison Electric Illuminating Company of New York, and the parties of the first part, by an instrument of even date herewith, and with the approval of the Mayor and Counsel to the Corporation of the City of New York, have so modified said contract, and the Empire City Subway Company (Limited) party of the second part, to whom said subways, conduits and ducts have been conveyed as aforesaid, desires to enter into a contract with the parties of the first part for the maintenance, leasing and management of said subways, conduits and ducts, and the building of further subways, conduits and ducts for telephone and telegraph conductors, and also further subways, conduits and ducts for low tension electric light and power conductors of the Edison Electric Illuminating Company of New York and for the owning, leasing, maintenance and management of such subways, conduits and ducts;

AND, WHEREAS, the making of this contract is deemed reasonable, advisable and proper for the purpose of carrying into effect the provisions and intent of said last mentioned act;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH :—

That, in consideration of the premises and of the mutual promises and agreements herein contained, and the sum of one dollar by each of the parties hereto to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto agree as follows :—

I. The party of the second part hereby agrees to provide, build, equip, maintain and operate, as herein provided, subways, conduits and ducts for telegraph and telephone conductors and for low tension electric light and power conductors of the Edison Electric Illuminating

Company of New York, its successors and assigns, in the following streets and avenues of the City of New York:—

Franklin St., West Broadway to Centre St., Elm St., Franklin to Worth St., 32nd St. Fifth to Madison Ave., 23rd St. Second to Madison Ave., 58th St. Tenth Ave. to North River, Lexington Ave. 79th St. to 129th St., 79th St. Madison to Fifth Ave., 124th St. Lexington to St. Nicholas Ave., Lexington Ave. 124th St. to North Side 125th St., Cortlandt St. Broadway to 18 Cortlandt St. and also such further subways, conduits and ducts for telegraph and telephone conductors, and for low tension electric light and power conductors of the Edison Electric Illuminating Company of New York, its successors and assigns, as the Board from time to time may order.

II. Such subways, conduits and ducts as the Empire City Subway Company (Limited) shall be ordered or directed to build, shall be built in accordance with the plans and specifications therefor furnished or to be furnished by the parties of the first part, or their successors, and the same shall be provided, built, equipped, maintained, operated and kept in good repair by and at the cost of the party of the second part who will, upon the reasonable demand of the parties of the first part, or their successors, adopt any and all necessary improvements that will increase the usefulness and efficiency of the system contemplated by this contract and the acts above referred to. The parties of the first part and their successors shall have the right, at any time, to make such modifications and changes as may be reasonably necessary in said subways, conduits and ducts or any of them, or the construction, plans, material, or any other matter connected with them, or any of them, or with the construction maintenance or operation of them, or any of them, and the party of the second part shall conform to and carry out any reasonable changes or modifications so made. The said subways, conduits and ducts in the streets and avenues above specified shall be completed on or before the first day of July, 1891, and such further subways, conduits and ducts as the said Board of Electrical Control shall from time to time order, shall be built within such reasonable time as said Board shall prescribe.

III. The party of the second part shall, at its own cost, furnish to the parties of the first part, and their successors, any and all maps,



working or other plans profiles, surveys and drawings, made to scale or otherwise and all accessible data, figures and information that may be requested by said parties of the first part, or their successors, and necessary, or deemed so to be, for any purpose relating to, or connected with said subways, conduits and ducts, or the duties of the said parties of the first part, or their successors, in connection therewith, or relation thereto, and shall also reimburse the parties of the first part, or their successors, for all reasonable expenses incurred by them in superintending and inspecting the construction of said subways, conduits and ducts.

IV. The spaces in said subways, conduits and duct shall be leased by the party of the second part to any company or corporation having lawful power to operate telegraph or telephone conductors in any street, avenue or highway in the City of New York, or to the Edison Electric Illuminating Company of New York, its successors or assigns, if it or they shall apply for the same.

No space not actually needed for occupation by its electrical conductors in the due course of its business shall be leased to any company or corporation to the exclusion or detriment of any other company or corporation needing space in said subways, conduits and ducts, and desiring and able to pay for the same.

The said party of the second part shall, without charge, supply to the City of New York, all space in said subways, conduits and ducts necessary for its electrical conductors and the electrical conductors of each separate department of said city which may now or hereafter be required.

If at any time the space in such subways, conduits ducts shall not be sufficient for all the companies or corporations so applying for the same, or for the city of New York, or any of its departments, the additional space needed shall be provided by the party of the second part at its own cost, by the construction, maintenance, equipment and operation of additional subways, conduits and ducts, sufficient therefor, subject, however, to the same conditions and the same control by the parties of the first part or their successors, as the original subways, conduits and ducts are by the terms of this contract and by any law.

This contract to be without prejudice to the right of the parties of the first part to enter into such other, further, or different contracts as shall be necessary to carry out the intent and purpose of Chapter 716, Laws of 1887.

V. The party of the second part may fix a fair scale of rents to be charged according to the kind of conductors and the amount of space required therefor, which shall be at the same rate to all the occupants having a like use of said subways, conduits and ducts, but the scale of rentals or any charges fixed or made by the party of the second part shall at all times be subject to the control, modification and revision of the parties of the first part, or their successors; and no contract shall be made between the party of the second part and any company or corporation on any terms which shall not require payment by such other company or corporation of rents at the rate so fixed, or as modified by said Board.

VI. Whenever the net annual profits of the party of the second part, remaining after the payment of the reasonable and necessary expenses of maintaining and operating such subways, conduits and ducts, shall exceed ten per cent. upon the actual cash capital invested by it in providing, constructing and equipping such subways, conduits and ducts, then the excess of such profit over the ten per cent. shall be paid into the Treasury of the City of New York, but, if, in any year or years prior to the earnings of such excess, the earnings of the party of the second part shall not have equalled ten per cent. then the party of the second part shall be first entitled to recoup itself out of such excess for the difference between the actual annual earnings, and the said ten per cent., the intention hereof being that the party of the second part shall have the right to earn and receive such ten per cent. for each and every year, and that no payments shall be made to the City of New York out of such excess of earnings until the party of the second part shall first have actually earned and received ten per cent. for each year theretofore. And the party of the second part shall and will at all times, keep just, full and true books of account, which shall show in detail the transactions had by it, and with whom the same were had, the nature thereof and especially:—

1. The amount of space in said subways, conduits and ducts occupied, with the names of the occupants thereof and the respective amounts of such space occupied by each occupant.
2. The number and kind of electrical conductors therein, with the names of the owners or users thereof.

3. The gross and net amount, in detail, of rentals and charges and monies of all kinds collected or received by the party of the second part and from whom and for what the same were received or collected, specifying the names of those paying such monies, and the cause or consideration of such payment in detail.

4. All payments of every kind made by the party of the second part, specifying in detail and separately each payment and to whom the same was made, and the cause or consideration thereof, so as to show specifically the nature thereof, so that it may be determined whether the same is chargeable to the cost of construction or of maintenance.

And said books and accounts, and all the books, accounts, papers and writings of the party of the second part shall at all times be open to the inspection of the parties of the first part, or their successors, and of the Comptroller of said City, or any person or persons by him or them deputed to examine the same, and they or he may copy the whole or any part thereof.

And the said party of the second part shall and will, on the first day of October of each year, make and return a statement to the Comptroller of the City of New York, in such form and verified as he may require and prescribe for the year ending the next preceding first day of September. And any monies payable to the City under this clause of this agreement, by the party of the second part shall be paid annually on the first day of November.

VII. The party of the second part shall not open any street surface without first obtaining a permit therefor from the Commissioner of Public Works or other officers or department of said City vested by law with the control of the surface of the street to be opened, and giving to him or it, such an agreement as he or it may approve and require for the proper restoration of the pavement of said street and the surface thereof, and for keeping the same in repair for one year after the same has been so replaced or restored.

VIII. The party of the second part shall not be deemed to be the servant or agent of the parties of the first part or their successors, or of the Mayor, Aldermen and Commonalty of the City of New York, in doing any act under or in execution or performance of this contract, but shall be deemed to be and is hereby intended to be, made and dealt with by the parties of the first part and their successors, and all per-

sons whomsoever as an independent party contracting with the parties of the first part, and their successors and others, and having and acquiring such rights for itself as this contract secures to it.

IX. All companies occupying space in said subways, conduits and ducts, shall own their own conductors and shall have the full management and control thereof except where otherwise mutually agreed upon between the said party of the second part and said companies, subject to the approval of the parties of the first part, or their successors; but said management and control shall be subject to the rights of all other occupants of said subways and to such reasonable rules and regulations as may be made by the said party of the second part with the approval of the parties of the first part or their successors. All maintenance and repairs of such conductors shall be done by the company owning them, under the supervision of the party of the second part, who shall prevent injury to the conductors of other occupants.

X. The party of the second part shall give a bond to the parties of the first part and their successors in the penal sum of Two hundred and fifty thousand dollars with good and sufficient surety, satisfactory to the parties of the first part or their successors, securing the just and full performance of this contract, and the building or providing of said subways, conduits and ducts as herein provided and securing said parties of the first part and their successors, and the Mayor, Aldermen and Commonalty of said City well and safely against any and all patent and other suits arising from the building and operation, use and maintenance of said subways, conduits and ducts, or of any subways, conduits and ducts provided by the party of the second part, whether the same now are or shall hereafter be built by it, and in the case of the insolvency or death of either of the sureties upon such bond the party of the second part will, upon the request of the parties of the first part or their successors, give a new bond of the same tenor and effect and subject to approval the same as the bond so originally to be given. The said bond shall also contain a guarantee to the City of New York, for any and all damages to said City by reason of the construction of said subways, conduits and ducts.

XI. If at any time, in the opinion of the parties of the first part or their successors, there shall be a substantial failure by the party of the second part to fully carry out the provisions of this agreement, and

it is so adjudged by competent judicial authority, the Mayor, Aldermen and Commonalty of the City of New York may enter into possession of such subways, conduits and ducts, and the party of the second part shall, subject to any valid mortgage or liens then thereon outstanding, not exceeding fifty per cent. on the actual cost of such subways and all leases or contracts then existing for the use thereof, as hereinbefore provided, forfeit its interest in such subways, conduits and ducts, and will quietly and peaceably surrender the possession thereof to the Mayor, Aldermen and Commonalty of the City of New York, who shall thereupon and thereafter hold and own the same, subject, however, to the same powers and duties of the parties of the first part, or their successors as the same would otherwise have been held subject to by the party of the second part, and the same until otherwise provided by law shall be maintained and operated by the said Mayor, Aldermen and Commonalty of the City of New York, by and through the parties of the first part or their successors, subject to such lawful liens, mortgages, leases and contracts.

XII. The parties of the first part hereby grant to the party of the second part the right to build such subways, conduits and ducts as the parties of the first part shall order the party of the second part to build for telegraph or telephone companies, or for low tension electric light and power conductors of the Edison Electric Illuminating Company of New York, in accordance with such plans and specifications as shall at any time be furnished by the parties of the first part as hereinbefore provided, and said parties of the first part hereby agree to use all lawful means within their power to compel all authorized persons or companies using telegraph and telephone conductors, and also the Edison Electric Illuminating Company of New York, to comply with the provisions of law and to place their conductors in said subways, conduits and ducts, and to pay a fair rental for the space occupied therein, but neither the parties of the first part, nor their successors, nor the Mayor, Aldermen and Commonalty of the City of New York shall be liable or responsible for any neglect or failure on the part of any such company or person so to place their conductors in said subways, conduits and ducts, or, having placed their conductors therein, to pay the fair rental for the space occupied by him or it; nor shall the Mayor, Aldermen and Commonalty of the City of New York be liable for any neglect, failure or refusal in the premises of the parties of the first part or their successors.

XIII. The successors of the parties of the first part shall be construed to include those who may succeed them as Commissioners under the provisions of existing laws or under the provisions of any law hereafter passed by the Legislature of the State of New York or any officer or officers of the City of New York who shall succeed to the powers and duties of the parties of the first part, or any part of such powers and duties under the provisions of any law now existing or hereafter enacted by the Legislature or any other person, or officers hereafter appointed or selected pursuant to any law to succeed to the powers and duties or any part thereof of said parties of the first part.

XIV. The said party of the second part shall, at any time after January 1, (1897), eighteen hundred and ninety-seven, upon the demand of the Commissioners of the Sinking Fund in the City of New York, by proper instrument or instruments of conveyance or transfer, in due form and duly executed, sell, assign, transfer, convey and set over to the Mayor, Aldermen and Commonalty of said City, the subways, conduits and ducts constructed by it, as aforesaid and all or any of the contracts or other property of any kind held or owned by the party of the second part, for any of the purposes of its incorporation, when the said Commissioners of the Sinking Fund shall request them so to do, and upon payment of the actual cost thereof; and if the said company shall not have earned ten per cent. per annum on actual cost during the term of this contract a further payment shall be made in addition to the cost not exceeding ten per cent. on such cost to the extent of such deficiency in annual earnings, or such less sum as may be agreed upon, for which payment the Commissioners of the Sinking Fund shall provide, as provided by law; such transfers, however, to be subject to any valid liens thereon outstanding not exceeding fifty per cent. on the actual cost of such subways and subject to all leases or contracts for the use of such subways then existing.

XV. This agreement shall not bind either of the parties thereto unless and until the bond hereinbefore mentioned and required to be given by the party of the second part shall be given within ten days hereafter or within such further time not to exceed twenty days additional as may be granted for that purpose within said ten days by said parties of the first part or their successors.

Nothing in this contract shall be construed as granting to the party of the second part any exclusive privileges, immunity or franchise whatsoever.

XVI. The subways, conduits and ducts conveyed to the party of the second part by the Consolidated Telegraph and Electrical Subway Company, as hereinbefore recited, shall be owned and operated by the party of the second part under and subject to the provisions of this contract and the rights and obligations of the parties of the first part, the party of the second part and the City of New York with reference thereto shall be the same as if said subways, conduits and ducts had been constructed by the party of the second part under and by virtue of this contract. If at any time it shall become necessary for any purpose under this contract or otherwise, to consider the cost of said subways, conduits and ducts or the income from rentals of space therein prior to the date of this contract or the cost of operating and maintaining the same prior to said date, the cost of said subways, conduits and ducts to the said Consolidated Telegraph and Electrical Subway Company shall be taken as the cost thereof and the income from rentals of space therein received by the said Consolidated Telegraph and Electrical Subway Company, prior to said date and their proportionate share of the expenses of the said Consolidated Telegraph and Electrical Subway Company in operating and maintaining its subways in the City of New York, prior to said date, shall be taken as the income from said subways, conduits and ducts and the cost of operating and maintaining the same respectively, within the meaning of this contract, just as though said subways, conduits and ducts had been built by, said income received by, and said expenses incurred by the party of the second part under this contract. But no default or act of the said Consolidated Telegraph and Electrical Subway Company shall in anywise prejudice or affect the party of the second part's rights in or title to said subways, conduits and ducts.

XVII. As the Consolidated Telegraph and Electrical Subway Company by its contract with said Board of Electrical Control in and for the City of New York, as modified by said instrument, of even date herewith, remains under the obligation to build such subways, conduits and ducts as may be ordered for electric light and power conductors except such as shall be constructed for the use of the low tension conductors of the Edison Electric Illuminating Company of New York, its successors and assigns, nothing in this agreement shall impose upon the party of the second part the obligation to build or maintain such

subways, conduits and ducts and the obligations and rights of the said Consolidated Telegraph and Electrical Subway Company with reference to the building, maintaining and leasing of such subways, conduits and ducts shall continue as before said modification of its said contract.

XVIII. It is hereby declared and agreed that the word "conductors" wherever used in this instrument shall be taken to mean feeders, wires and all other appliances used for transmitting electricity underground.

XIX. This contract shall be executed in triplicate, one copy thereof to be kept and retained by each of the parties hereto, and the third copy thereof to be deposited and filed in the office of the Comptroller of the City of New York, and to be a public record.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals, and the party of the second part has caused its corporate seal to be hereunto affixed, and these presents to be signed by its President and attested by its Secretary the day and year first above written.

HUGH J. GRANT, Mayor  
Commissioner  
JACOB HESS, Commissioner  
THEO. MOSS, Commissioner

EMPIRE CITY SUBWAY COMPANY (LIMITED),  
By, DAVID B. PARKER  
President.

(Seal)

Attest:—  
U. N. BETHELL  
Secretary.

WE HEREBY APPROVE of the foregoing instrument and the execution thereof by the Board of Electrical Control in and for the City of New York.

Dated, New York, May 15th, 1891.

HUGH J. GRANT Mayor.  
WM H. CLARK  
Counsel to the Corp.



STATE OF NEW YORK,  
CITY AND COUNTY OF NEW YORK. } ss:

On this 15<sup>th</sup> day of May, in the year one thousand eight hundred and ninety-one, before me Henry Winans, a Notary Public in and for the County of Kings, duly appointed and commissioned and dwelling in the City of Brooklyn, in said County, and having a certificate filed in the City and County of New York, personally appeared Hugh J. Grant, Mayor of the City of New York, Jacob Hess and Theodore Moss, to me severally personally known and known by me to together constitute the Board of Electrical Control in and for the City of New York, and to be the persons mentioned and described in and who executed the foregoing instrument and they severally acknowledged that they executed the same as such Board of Control for the purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 15<sup>th</sup> day of May, 1891.

(SEAL)

HENRY WINANS,  
Notary Public,  
Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,  
CITY AND COUNTY OF NEW YORK. } ss:

On this 15<sup>th</sup> day of May, in the year of our Lord one thousand eight hundred and ninety-one, before me F. De Lysle Smith a Notary Public, in and for the State of New York, duly appointed and commissioned under and by virtue of the laws of said State, and dwelling in the City of Brooklyn personally appeared David B. Parker, President of the Empire City Subway Company (Limited), and Union N. Bethell the Secretary of the same Company, each personally known to me to be such; and they being by me duly and severally sworn, did

severally depose and say; that he, the said David B. Parker resided in the Township of Cold Springs Cattaraugus County, New York, and was the President of the said Empire City Subway Company (Limited); that he the said Union N. Bethell resided in the City of Brooklyn and was the Secretary of said Company.

That they knew the corporate seal of said Company; that the seal affixed to the foregoing deed and purporting to be the seal of said Empire City Subway Company (Limited) was such seal; that it was so affixed by order of the Board of Directors of said Company, and that by the like order they severally signed their names thereto as President and Secretary.

And the said David B. Parker and Union N. Bethell severally acknowledged to me that they executed the said deed freely and voluntarily and as the act and deed of the said Empire City Subway Company (Limited) for the uses and purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at the City of New York, aforesaid, on the said 15th day of May, A. D., 1891.

(SEAL)

F. DE LYSLE SMITH  
Notary Public,  
Kings County and  
City and County of New York.

REGISTRANT'S NOTE: The subways, conduits and ducts constructed for the low-tension conductors of The Edison Electric Illuminating Company of New York and its successor, The New York Edison Company, were as of January 1, 1932 conveyed by Empire City Subway Company (Limited) to Consolidated Telegraph and Electrical Subway Company.

IN THE MATTER OF THE SUPPLEMENTAL PETITION OF  
BELL ATLANTIC-NEW YORK FOR AUTHORITY TO  
PROVIDE IN-REGION INTERLATA SERVICES IN NEW YORK.

**Empire City Subway Rate Determination November 28, 1996**

**EMPIRE CITY SUBWAY RATE DETERMINATION  
NOVEMBER 28, 1986**

1. By letter of January 31, 1986, Empire City Subway Company (Limited), hereafter "Empire", filed a proposed schedule of conduit rentals for the year 1985. These rates were as follows:

2-1/2 inch or narrower conduit	\$305 per mile per month
3 inch conduit	\$351 per mile per month
4 inch conduit	\$488 per mile per month
Coil Cases	\$316 per case per year

Empire stated that the calculations leading to the determination were "computed in accordance with the method prescribed in the [December 13, 1985] Supplemental Determination, [and] are based on the actual results for 1985, thus precluding the necessity for the use of estimates". Two tenants, Group W Cable, Inc. and Manhattan Cable Television, Inc. acting through the New York State Cable Television Association ("Intervenors"), objected to Empire's proposed 1985 rates.

2. Intervenors, in a letter dated April 2, 1986 and after filing requests for information on February 13, 1986 to which Empire responded on February 28, 1986, posed three issues with respect to Empire's proposed 1985 rates in which they contest: (1) a downward adjustment in 1985 income of \$1,307,677 for "taxes which Empire has not and will not pay"; (2) the appropriateness of a deduction from income for custom revenues in excess of the allowable rate of return for conduit rentals; and (3) Empire's use of a 12.58% weighted rate of return for any period beyond December 31, 1985. Each of these issues is separately treated below.
3. Claimed Tax Adjustment. During the fourth quarter of 1985, Empire determined on the basis of (a) the Public Service Commission's October 11, 1985 decision establishing a lower rate of return for New York Telephone than had previously been set, and (b) methodology set forth in the City's 1984 Supplemental Decision, it would be faced with refunding to its customers approximately \$2,467,967 ("1985 Refund Accrual") on its 1985 charges. Neither party contests the appropriateness of Empire recognizing this 1985 Refund Accrual. At issue is whether it was appropriate for Empire to make an adjustment of \$1,307,677 for taxes since this adjustment is an accounting entry rather than reflective of taxes actually paid ("Claimed Tax Adjustment"). Intervenors assert that "this \$1,307,677 understatement produces a significant overstatement in the scale of rentals required to produce the 12.72%/11.85% rate of return". Empire asserts that the Claimed Tax Adjustment is supported by generally accepted accounting practices and that Intervenors' methodology is flawed.

4. We agree with Empire that its methodology is correct. Empire's rate computations start with a per book income statement, in this case an income statement which Empire had adjusted to reflect revenues and taxes consistent with the 12.58% weighted rate of return which Empire knew, as of December 1985, it would be allowed to earn. (See Attachment B to Empire letter of January 31, 1986.) Of necessity, Empire then had to adjust the per book income statement to reflect revenues and taxes consistent with the rate of return for rates which had actually been collected during 1985 (Attachment C to Empire's letter of January 31, 1986). It is this adjustment which intervenors question. By this procedure Empire simply restored its revenues, taxes and earnings to levels which were consistent with actual collections. It is important to note that in computing the allowed revenue requirement for the new rates, Empire completed the process and balanced these entries by once again deducting the excess revenues and associated taxes. Accordingly, we find Empire's treatment of the Claimed Tax Adjustment to be consistent with accounting principles underlying the use of historic test years and adjustments for known changes.
5. Custom Work Earnings. In prior rate determinations, the City has required Empire to take account of revenues from custom work, a non-regulated activity, in its regulated conduit rate calculations. Empire has done so, but only to the extent that its income reflects the allowed rate of return, a practice which Empire states it has followed over the past two rate proceedings. Empire alleges that this adjustment, although not reflecting an "actual" state of affairs, is needed to prevent custom work revenues from subsidizing conduit rentals or vice versa. Intervenor contest Empire's failure to include \$11,567 in actual custom work revenue (i.e., the sum over and above the rate of return) because it does not comply with the City's directive in the December 13, 1985 Supplemental Decision that the methodology to be used is that which produces the known result.
6. We agree with Empire's contention that conduit rentals should not be used to subsidize custom work and vice versa. Accordingly, we accept Empire's limitation of the recognition of its custom work revenues to the allowed rate of return even while we acknowledge that, as pointed out by Empire, such an adjustment "removes the effect of Custom Work, but does not remove Custom Work, per se".
7. Use of a Weighted Rate of Return. Empire's allowed rate of return is the same that the PSC allows New York Telephone. In earlier proceedings, the City required Empire to use a split rate of return reflecting the rate of return for New York Telephone for the appropriate time periods. Here, Empire is entitled to a rate of return of 12.72% for the period January-October, 1985 and a rate of return of 11.85% for the period November-December, 1985. Empire has converted this to a weighted average rate of return of 12.58%. Intervenor contest the use of a 12.58% rate of return for any period beyond December 31, 1985 inasmuch as the PSC rate of return for New York Telephone for the period November 1985 forward is 11.85%.

8. The City has traditionally used a single rate of return until a new rate proceeding is initiated, notwithstanding interim action by the Public Service Commission changing New York Telephone's rate of return. We see no reason to change that procedure now particularly where, as here, no other adjustments are being made. Accordingly, the 12.58% weight return will remain in effect until a new proceeding sets an appropriate rate of return for the period in question. (In this regard, we take note of Empire's intention, as stated in its letter of June 10, 1986, to shortly file for new rates for calendar 1986.)
9. Fair and Reasonable Rates. Upon consideration, therefore, Empire's rates as of January 1, 1985 are determined to be as set forth in its January 31, 1985 letter, namely:
- |                                |                          |
|--------------------------------|--------------------------|
| 2-1/2 inch or narrower conduit | \$305 per mile per month |
| 3 inch conduit                 | \$351 per mile per month |
| 4 inch conduit                 | \$488 per mile per month |
| Coil Cases                     | \$316 per case per year  |
10. Empire is hereby directed to notify its customers of this determination within 15 days of this decision and to advise the City as to when refunds to customers will be made.

  
Hadley W. Gold  
Commissioner

November 28, 1986

IN THE MATTER OF THE SUPPLEMENTAL PETITION OF  
BELL ATLANTIC-NEW YORK FOR AUTHORITY TO  
PROVIDE IN-REGION INTERLATA SERVICES IN NEW YORK.

**Empire City Subway Co. Rules and Regulations Governing  
the Occupancy of the Telegraph and Telephone Subways**